Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

JOHN A. LAWSON
and
SPANISH COVE SANITATION, INC. PETITIONERS

v.

UNITED STATES OF AMERICA RESPONDENT

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER, IN A CRIMINAL PROCEEDING UNDER THE CLEAN WATER ACT, 33 U.S.C. §1251, ET SEQ., THE DISTRICT COURT HAS JURISDICTION TO ENTER JUDGMENT WHERE A UNITED STATES ATTORNEY INSTITUTED THE PROCEEDINGS WITH NO PRIOR REQUEST FROM THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY.

II. WHETHER THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN REFUSING TO REVERSE THE TRIAL COURT'S ORDER EXCLUDING FROM EVIDENCE CLEAR PROOF OF SELECTIVE AND VINDICTIVE PROSECUTION.

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The opinion of the United States Court of Appeals for the Sixth Circuit is cited as Numbers 94-6508 and 94-6509 (6th Cir. 1996) and is set forth in this Appendix at App-1.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 28, 1996. (App-1) Petition for Rehearing was denied on August 20, 1996. (App-13) This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Clean Water Act, 33 U.S.C. § 1366, provides in pertinent part:

> § 1366. Appearance
>
> The Administrator [of the Environmental Protection Agency] shall request the Attorney General to appear and represent the United States in any civil or criminal action instituted under this chapter to which the Administrator is a party.

The Clean Water Act, 33 U.S.C. § 1251(d), provides:

§ 1251. Congressional declaration of goals and policy

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called 'Administrator') shall administer this chapter.

The Clean Water Act, 33 U.S.C. § 1342(i), provides:

§ 1342. National pollutant discharge elimination system

(i) Federal enforcement not limited

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

STATEMENT OF THE CASE

Petitioner John A. Lawson is the president and principal shareholder of Spanish Cove Sanitation, Inc. [Spanish Cove], Petitioner. Spanish Cove is a Kentucky corporation which owns a small wastewater treatment facility located in Jefferson County, Kentucky.

Spanish Cove is operated under the direction and authority of the Environmental Protection Agency [EPA] and the Commonwealth of Kentucky Natural Resources and Environmental Protection Cabinet [the

Commonwealth], pursuant to the National Pollutant Discharge Elimination System [NPDES], 33 U.S.C. §1342, and the Kentucky Pollutant Discharge Elimination System [KPDES], KRS 224, respectively. Spanish Cove holds permit number KY0039802 under the Kentucky law. Under its permit, Commonwealth and Federal law, Spanish Cove is required to, and regularly has, submitted monthly discharge monitoring reports which state truthful accounts of the levels of various effluents discharged from the Spanish Cove plant. During all times relevant to this proceeding, Petitioners were actively working with officials from the Commonwealth to bring Spanish Cove into full compliance with the permitted levels of effluent discharge.

In August, 1992, Assistant United States Attorney Randy Ream notified Petitioners of his intention to seek grand jury indictment against them regarding alleged violations of 33 U.S.C. §1319. At no time were the Petitioners contacted by the Commonwealth or the EPA regarding the possibility of criminal charges under the Clean Water Act. Of his own authority, AUSA Ream informed Petitioners that to avoid indictment, they would be required to enter a plea of guilty to three violations of 33 U.S.C. §1319. Following entry of the plea, a fine would be determined and a redesign of the Spanish Cove facility ordered. AUSA Ream offered no guidance as to the level of the fine or the cost of redesign. (App. 34) Petitioners refused.

On February 2, 1993, under the supervision of AUSA Ream, the grand jury returned indictment number CR93-00015-L(M), charging Petitioners with seventeen counts of violating of 33 U.S.C. §§ 1311(a), 1319(c)(1)(A) and (c)(2)(A). (App. 15) The indictment was based entirely upon the discharge monitoring reports which

Petitioners were required to submit to the Commonwealth under the KPDES program.

Prior to trial, Petitioners offered proof of literally thousands of violations of the KPDES permit effluent discharge levels which resulted in no criminal prosecution. The United States was unable to produce evidence of even a single criminal prosecution brought in the Commonwealth, despite the thousands of violations. The trial court granted the United States' motion in limine to exclude Petitioner's evidence of the other non-prosecuted violators, apparently in reliance upon the United States offer of two prior civil matters which had been prosecuted through the Department of Justice's Louisville office at the request of the EPA.

At the trial of this matter, the United States offered no proof of actual environmental harm from the effluent discharge at Spanish Cove. The jury returned a verdict of guilty on fourteen of the seventeen counts alleged in the indictment. On November 8, 1994, the United States District Court for the Western District of Kentucky entered judgment against the Petitioners and sentenced Mr. Lawson to serve six months in prison. The Sixth Circuit Court of Appeals affirmed as to all matters except the imposition of a fine, upon which issue it reversed. Resentencing on the fine has been stayed by the district court pending the exhaustion of Petitioners right to appeal.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT HAS NO JURISDICTION TO ENTER JUDGMENT IN A CRIMINAL PROCEEDING UNDER THE CLEAN WATER ACT, 33 U.S.C. §1251, ET SEQ., WHERE A UNITED STATES ATTORNEY INSTITUTED CRIMINAL PROCEEDINGS WITH NO PRIOR REQUEST FROM THE ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY.

There is no clear precedent on this important issue.

In the absence of clear precedent, the Attorney General, acting through Assistant United States Attorneys, may usurp from the Administrator of the EPA [Administrator] the authority to bring criminal enforcement proceedings under 33 U.S.C. § 1319(c) to the detriment of the objectives of the Clean Water Act. The defect here is jurisdictional in that Congress has clearly and unambiguously placed enforcement authority, including criminal enforcement authority, within the discretion of the Administrator of the EPA.

The criminal provisions set forth in 33 U.S.C. §1319(c) are strict liability offenses carrying substantial fines and imprisonment. The Attorney General, acting through Assistant United States Attorneys, is without the technical and scientific expertise to determine when, and if, criminal sanctions are required in a particular case. Prior referral of criminal cases from the Administrator to the Department of Justice is the only means by which the

goals of the Clean Water Act can be accomplished. Congress set forth its goals in 33 U.S.C. §1251(a) which states, "The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."

Subsequent to the Petitioner's prosecution, on March 31, 1995, the Administrator published an interim policy regarding criminal referrals to the Department of Justice (60 Fed.Reg. 16, 875). This interim policy is relevant to the current prosecution for two reasons. First, it presumes that the EPA has, and always has had, the sole authority to refer cases to the Department of Justice for prosecution. Second, it demonstrates that EPA enforcement policies will be utterly confounded unless the Clean Water Act's criminal provisions are authoritatively placed within the sole discretion of the Administrator. In relevant part, this interim policy states:

> Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement
> I. Background
> D. Principles for Voluntary Compliance
> The interim policy that EPA is announcing today is based on seven principles:
> 1. Self-policing by regulated entities can play a crucial role in finding, fixing and preventing violations.
> * * *
> 3. Regulated entities that self-police and that voluntarily disclose and self-correct violations in accordance with this policy should be assessed penalties that are consistently and predictably lower than penalties for those who do not.

4. Regulated entities that self-police and voluntarily disclose and self-correct violations in accordance with this policy should also not be recommended for criminal prosecution.

* * *

In United States v. Cargill, Inc., 508 F.Supp. 734, 740 (D.Delaware 1981), the United States, at the request of the EPA, sued under the Clean Water Act to enjoin a wastewater treatment facility for violations of its permit and to impose civil penalties for past violations. The district court expressed the difficulty caused by the uncertainty of the Act's enforcement provisions. The district court stated:

> The means prescribed by the [Clean Water] Act for implementing the primary goal of cleaning up the nation's waters reflects the Congressional intent to encourage cooperative federalism. However, the Act's imprecision in delineating the exact roles of the various participants has often done much to exacerbate federal/state tensions, as shown by the present case. See, EPA v. California, 426 U.S. 200, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976); Cleveland Electric Illuminating Co. v. EPA, 603 F.2d 1 (C.A.6, 1979); Save the Bay, Inc. v. Administrator of the EPA, [556 F.2d 1282 (C.A.5, 1977)]; American Iron and Steel Institute v. EPA, [526 F.2d 1027 (C.A.3, 1975)]; 'State/EPA Relations Severely Strained, General Accounting Office Report Says,' 11 Env.Rep. Current Developments 649 (August 29, 1980).

In bypassing the Administrator's authority to decide whether to prosecute criminally, AUSA Ream has created a great threat to an already strained system. The threat of federal criminal prosecution is a virtual guarantee that individual permit holders will refuse to incriminate themselves through their discharge monitoring reports. Self-policing by permit holders will fail.

An Act passed by Congress and signed by the President can limit the power previously granted the Attorney General to prosecute claims for the Government. United States v. California, 332 U.S. 19, 27, 67 S.Ct. 1658, 91 L.Ed. 1889, 1893 (1947). Limitations on the authority of the Department of Justice to proceed under the criminal laws require a clear and unambiguous expression of the legislative will. United States v. Morgan, 222 U.S. 274, 282, 32 S.Ct. 81, 82, 56 L.Ed. 198, 200 (1911).

The Clean Water Act of 1977, 33 U.S.C. §1366 contains such a clear and unambiguous expression of Congressional intent. This statute states:

> §1366. Appearance
>
> The Administrator shall request the Attorney General to appear and represent the United States in any civil or criminal action instituted under this chapter to which the Administrator is a party. Unless the Attorney General notifies the Administrator within a reasonable time, that he will appear in a civil action, attorneys who are officers or employees of the Environmental Protection Agency shall appear and represent the United States in such action.

Statutory language that an act 'shall' be carried out is generally regarded as mandatory. South Carolina Wildlife Federation v. Alexander, 457 F.Supp. 118, 130 (D.S.C. 1978); Greene v. Costle, 557 F.Supp. 1225, 1228-30 (W.D.Tn. 1983)(noting that Congress uses the terms "may" and "authorized" in the Clean Water Act, but not interchangeably with "shall.") In bringing this criminal action, AUSA Ream was acting without prior request from the Administrator.

The criminal provisions of 33 U.S.C. §1319(c) are within Title 33 U.S.C., Chapter 26 - Water Pollution Prevention and Control. Congress clearly and unambiguously placed the authority to administer the criminal provisions within the sole authority of the Administrator under 33 U.S.C. §1251(d), which states:

> §1251. Congressional declaration of goals and policy
> (d) Administrator of Environmental Protection Agency to administer chapter
> Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called the 'Administrator') shall administer this chapter.

The Clean Water Act establishes a system of concurrent jurisdiction between the Federal and State authorities to apply and enforce the provisions of the Act. United States v. Cargill, Inc., 508 F.Supp. 734, 736 (D.Delaware 1981). Among the mechanisms for accomplishing the objectives of the Act is 33 U.S.C. §

1342, which permits the states to administer their own effluent discharge permit programs following approval of the state program by the EPA Administrator. At issue in the Petitioners' case is a violation of a permit issued under the Commonwealth's KPDES program. That Congress intended the jurisdiction over this program to be concurrently held between the states and the Administrator, as opposed to the Department of Justice, is clearly set forth in 33 U.S.C. § 1342(i). This statute states:

> § 1342. National pollutant discharge elimination system
> (i) Federal enforcement not limited
> Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

Congress' intent that either the State or the Administrator initiate criminal prosecutions under the Clean Water Act is evident from the legislative history of the legislation preceding the Clean Water Act of 1977, the Federal Water Pollution Control Act Amendments of 1972 (P.I 92-500; U.S. Congressional and Administrative News, p. 3809). Initially, the Senate bill required the Administrator to initiate civil actions or criminal proceedings. This requirement was modified by House Amendment to the extent that the Administrator is authorized, but not required, to bring civil or criminal proceedings. The House Amendment was adopted by Senate Conference. The House Amendment to Section 309 (33 U.S.C. §1319) states:

House Amendment

Section 309 is basically the same as the Senate bill except that the Administrator is authorized rather than required to initiate civil actions or criminal proceedings. Civil penalties cannot exceed $10,000 per day of violation, and criminal penalties cannot exceed $50,000 per day of violation and two years imprisonment.

Conference substitute

This is the same as the House amendment.

Senate Report Number 92-414, Section 309 - Federal Enforcement, presumes a scheme of Federal enforcement within the sole authority of the Administrator. In relevant part, the Senate report states:

> The Committee again, however, notes that the authority of the Federal Government should be used judiciously by the Administrator in those cases (sic) deserve Federal action because of their national character, scope, or seriousness. The Committee intends the great volume of enforcement actions be brought by the State. It is clear that the Administrator is not to establish an enforcement bureaucracy but rather to reserve his authority for the cases of paramount interest.
>
> * * *
>
> . . . . The Administrator retains, without qualification, the authority presently available under the Refuse Act to prosecute for unlawful discharges.

Decisions of the various Circuit Courts of Appeals and United States District Courts lend persuasive, but not decisive, authority on this issue. From these authorities, it is clear that the defect is jurisdictional.

In DuBois v. Thomas, 820 F.2d 943, 950 (8th Cir. 1987), the Court bifurcated its analysis of the Administrator's enforcement duties under the Clean Water Act into the duty to investigate and the duty to enforce. The Court of Appeals for the Eighth Circuit ruled that the duties of the Administrator to investigate violations were discretionary. DuBois, 820 F.2d at 948 (8th Cir. 1987). With regard to the duty to enforce, the Court emphasized that the statutory language regarding enforcement is not clear and, therefore, upheld the Administrator's interpretation that enforcement is discretionary. The Court stated:

> We believe that neither the language of § 309(a)(3) nor its legislative history can be said to evince a clear intent of Congress as to whether the enforcement duties of the Administrator are mandatory or discretionary. Under such circumstances, the Administrator's interpretation is a permissible construction of § 309(1)(3). That interpretation therefore must stand. Chevron [U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 844-45.]
>
> We hold that the duties imposed on appellants by § 309(a)(3) of the FWCPA are discretionary. The district court should have dismissed the FWCPA claim against appellants for lack of subject matter jurisdiction.

In Commonwealth of Kentucky, ex rel. Hancock v. Ruckelshaus, 497 F.2d 1172, 1177 (6th Cir. 1974), the Sixth Circuit was called upon to interpret the enforcement provisions of the Clean Air Act, 42 U.S.C. §1857, et seq. There, the Commonwealth brought suit to compel the Administrator of the EPA to require various federal agencies operating air pollutant emitting equipment within the Commonwealth to seek a permit issued by the Commonwealth. The Sixth Circuit found, under the Clean Air Act, that there had been a waiver of sovereign immunity with respect to the Administrator and he could be so compelled if the decision to enforce the Clean Air Act was mandatory, rather than discretionary. The Sixth Circuit ruled:

> The district court correctly held that it had no power to review the decision of EPA not to commence actions under section 113 since this was a decision on 'agency action committed to agency discretion by law.' 5 U.S.C. §701(a)(2).

If, as argued by Petitioners, the EPA has the sole authority at the federal level to determine whether to criminally prosecute a permit holder, then the district court is without jurisdiction to enter judgment against the permit holder for violations of 33 U.S.C. §1319 in the absence of an EPA request for criminal prosecution. This Court spoke to this point in the context of the reviewability of an agency decision not to enforce in Heckler v. Chaney, 470 U.S. 821, 831, 84 L.Ed.2d 714, 723, 105 S.Ct. 1649 (1985). This Court stated:

> This Court has recognized on several occasions over many years that an agency's

> decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. See, United States v. Batchelder, 442 U.S. 114, 123-124, 60 L.Ed.2d 755, 99 S.Ct. 2198 (1979); United States v. Nixon, 418 U.S. 683, 693, 41 L.Ed.2d 1039, 94 S.Ct. 3090 (1974); Vaca v. Sipes, 386 U.S. 171, 182, 17 L.Ed.2d 842, 87 S.Ct. 903 (1967); Confiscation Cases, 7 Wall 454, 19 L.Ed. 196 (1869). This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement.

This Court ruled, Heckler v. Chaney, 470 U.S. at 837-838, 84 L.Ed.2d at 727 (1985):

> We therefore conclude that the presumption that agency decisions not to institute proceedings are unreviewable under §701(a)(2) of the APA is not overcome by the enforcement provisions of the FDCA. The FDA's decision not to take enforcement actions requested by respondents is therefore not subject to judicial review under the APA. The general exception to reviewability provided by §701(a)(2) for action 'committed to agency discretion' remains a narrow one, see Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 28 L.Ed.2d 136, 91 S.Ct. 814 (1971), but within that exception are included agency refusals to institute

> investigative or enforcement proceedings, unless Congress has indicated otherwise. In so holding, we essentially leave to Congress, and not to the courts, the decision as to whether an agency's refusal to institute proceedings should be judicially reviewable.

In the context of citizens suits pursuant to 33 U.S.C. § 1365, the courts have routinely held that, even though the Administrator may be required to enforce certain provisions of the Act, the method of enforcement is discretionary. DuBois v. EPA, 646 F.Supp. 741, 745 (W.D. Missouri 1986) (finding duty to enforce mandatory, but method of enforcement discretionary with Administrator); South Carolina Wildlife Federation v. Alexander, 457 F.Supp. 118, 134 (D.S.C. 1978) (Administrator's duty to enforce mandatory, but ". . . this court is not of the opinion that he is mandated to begin enforcement proceedings in the courts by initiating either a civil or criminal action."); Committee for the Consideration of the Jones Falls Sewage System v. Train, 387 F.Supp. 526, 530 (D.Maryland 1975) ("The Administrator has enforcement powers under various provision of the Act. He must be allowed to determine how a particular discharger should be proceeded against to best achieve the objectives of the Act."); Untied States v. Phelps Dodge Corporation, 391 F.Supp. 1181, 1184 (D.Arizona 1975) ("Thus, it seems clear that the bill as finally submitted and passed was intended to provide that while the Administrator must act in case of any violations, he has alternative methods of acting; i.e., either by civil or by criminal proceedings.").

By entering judgment against Petitioners without prior request from the EPA for the institution of criminal proceedings, the district court invaded the discretion of the

Administrator. The Court of Appeals for the Sixth Circuit similarly invaded this discretion in affirming Petitioners' convictions. As Congress has clearly and unambiguously placed the discretion to bring criminal enforcement proceedings within the authority of the Administrator, the courts below were without jurisdiction to enter judgment.

Respectfully, writ of certiorari should issue to review the judgments herein and to prevent future unrequested criminal proceedings from confounding the objectives of the Clean Water Act.

II. THE COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN REFUSING TO REVERSE THE TRIAL COURT'S ORDER EXCLUDING FROM EVIDENCE CLEAR PROOF OF SELECTIVE AND VINDICTIVE PROSECUTION.

This issue was presented upon appeal and in petition for rehearing to the Court of Appeals for the Sixth Circuit. The court below erred in refusing to reverse on this issue.

Prior to the trial of this matter, Petitioners offered into evidence proof of thousands of effluent limit violations under the KPDES system, emphasizing that none of the violating permit holders had been subjected to criminal prosecution. Petitioners further offered proof of 829 discharge monitoring violations by the Louisville-Jefferson County Metropolitan Sewer District [MSD] between January, 1989 and January, 1993. The United States moved the court in limine to exclude this evidence from trial, offering proof of only two prior civil prosecutions for KPDES violations which were initiated by

the United States Attorney's Office at the direct request of the EPA. One of these civil actions was against MSD in 1977; no proof was offered as to any sanction against MSD from 1989 through 1993. In granting the United States' motion, the district court erred.

In United States v. Bustamonte, 805 F.2d 201, 202 (C.A.6 1986), the Court of Appeals for the Sixth Circuit adopted the majority standard for selective prosecution. The Court stated:

> Accordingly, it has been held that a defendant asserting selective prosecution:
>
> ... bears the heavy burden of establishing, at least prima facie, (1) that while others similarly situated have not generally been proceeded against because of conduct of the type forming the basis of the charge against him, he has been singled out for prosecution and (2) that the government's discrimination of him has been invidious or in bad faith, i.e. based upon such impermissible considerations as race, religion, or the desire to prevent the exercise of his constitutional rights. Citations omitted.

The trial court excluded, pursuant to the United States' motion in limine, Petitioners' evidence of thousands of violations contained in discharge monitoring reports submitted pursuant to the KPDES system. The United States offered no proof of other criminal prosecutions under the Clean Water Act.

Petitioner Lawson has twice before been subject to

prosecution by AUSA Ream. In 1989, Ream prosecuted Lawson with regard to a minor infraction involving the destruction of foliage on Corps of Engineers property at Rough River, Breckinridge County, Kentucky (Citation No. AH883). Upon proof that the property actually belonged to Petitioner Lawson, this charge was dismissed. AUSA Ream again prosecuted Petitioner Lawson in 1992 (Citation No. A587634) for a minor infraction involving the placement of a utility building on Corp of Engineers property at Rough River, Kentucky. The current prosecution is, at least prima facie, "invidious."

In United States v. Andrews, 633 F.2d 449, 454 (1980), the Court of Appeals for the Sixth Circuit interpreted this Court's decision in Blackledge v. Perry, 417 U.S. 21, 94 S.Ct. 2098, 40 L.Ed.2d 628 (1974). The lower court stated:

> We emphasize that Blackledge does not require that a defendant show that a prosecutor was actually vindictive. Blackledge's proscriptions are triggered where a defendant shows that there is a realistic likelihood that a prosecutor acted vindictively. There are sound reasons for this. First, this takes into account the due process value that defendants be 'freed of apprehension of such a retaliatory motivation' on the part of a judge or prosecutor. Blackledge, supra, 417 U.S. at 28, 94 S.Ct. at 2102, quoting [North Carolina v.] Pearce, [395 U.S. 711, 725, 89 S.Ct. 2072, 2080, 23 L.Ed.2d 656 (1969)]. Second, such a standard is the only realistic way to police vindictiveness. As the Court

> noted in Pearce, supra at 724 n.20, 89 S.Ct. at 2080 n.20, 'the existence of a retaliatory motivation would, of course, be extremely difficult to prove in any individual case. Third, there is an important policy consideration. Prosecutors and criminal defendants are adversaries and prosecutors make honest mistakes. If the standard to be applied was proof of actual vindictiveness, a trial judge would have the Hobson's choice of either not barring the extra charge or of saying that a prosecutor acted wrongly. In some cases, a trial judge would, in effect, be calling the prosecutor a liar where the prosecutor claimed inadvertence and the judge ruled against him. We do not think that such confrontations before the judiciary and the executive branch are desirable. A standard of 'realistic likelihood of vindictiveness' allows the barring of charges in appropriate situations without the need to find that the prosecutor acted in bad faith. Footnotes omitted.

In United States v. Anderson, 923 F.2d 450 (6th Cir. 1991), cert. denied, 499 U.S. 980, 111 S.Ct. 1633, 113 L.Ed.2d 729, cert. denied, McNeil v. U.S., 111 S.Ct. 2062, 114 L.Ed.2d 467, the Court of Appeals set the "rule of law" for vindictive prosecution in the Petitioners' circuit. The lower court stated:

> A prosecutor vindictively prosecutes a person when he or she acts to deter the exercise of a protected right by the person prosecuted. United States v. Andrews, 633

> F.2d 449, 453-55 (6th Cir. 1980), cert. denied, 450 U.S. 927, 101 S.Ct. 1382, 67 L.Ed.2d 358 (1981). A person who claims he has been vindictively prosecuted must show that the prosecutor has some 'stake' in deterring the petitioner's exercise of his rights, and that the prosecutor's conduct was somehow unreasonable.

Anderson, supra., does not require the Petitioners to define what the prosecutor's "stake" is, but only to establish that he does have one. Petitioners have established at least a "realistic likelihood of vindictiveness" in that AUSA Ream has made two prior unsuccessful attempts at prosecution for unsubstantial violations. Second, and most concerning, AUSA Ream initiated this prosecution without prior request from the EPA. Third, the penalties sought by AUSA Ream in this prosecution are so greatly disproportionate to the alleged wrong that vindictiveness is apparent.

As is argued herein, AUSA Ream's conduct in seeking the prosecution of the Petitioners without prior request from the EPA was unreasonable. Both prongs of the Anderson and Andrews standards have been met.

A comparison of published cases to Petitioners' case demonstrates that AUSA Ream's conduct in prosecuting the Petitioners' was unreasonable due to the great disparity between the degree of penalty in this case and that in other cases. The vast majority of published decisions involve EPA compliance on dues or civil fines. In Southern Ohio Coal Company v. Office of Surface Mining, Reclamation and Enforcement, Department of the Interior, 20 F.3d 1418, 1420 (6th Cir. 1994), rehearing with

suggestion for rehearing en banc denied (1994), at issue was the discharge of "an estimated one billion gallons of water . . . . [which] contained levels of iron over 100 times the legal limit as well as excessive levels of zinc, manganese and copper." In Southern Ohio Coal Company, the Commonwealth of Kentucky had approved an emergency removal plan which would have allowed the mining company discharge of this water directly into surrounding creeks and streams, even though this was known to be fatal to all aquatic life in the area. Even though the EPA challenged the plan, no criminal penalty is discussed. Similarly, in USI Properties Corp. v. EPA, 517 F.Supp. 1235, 1237 (D.Puerto Rico 1981), the EPA issued a cease and desist order, not criminal punishment, in a case involving the pumping of "110,000 gallons of water per minute" off of an area determined to be protected wetlands.

At the trial of this matter, the United States offered absolutely no proof of environmental harm from the Spanish Cove facility. Yet, Petitioner Lawson has served six months in federal prison and is still potentially subject to substantial fines.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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Date: November 6, 1996

Nos. 94-6508/6509

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, ... Appellee
v.
SPANISH COVE SANITATION, INC.,
and JOHN LAWSON, ... Appellants

On Appeal From the United States District Court For
The Western District of Kentucky
CR 93-00015-01-L(F)

Before: **NELSON** and **BOGGS**, Circuit Judges, and **GILMORE**, District Judge.[1]

DAVID A. NELSON, Circuit Judge. This is a consolidated appeal from convictions and sentences in criminal proceedings brought under the Federal Clean Water Act. The defendants, Spanish Cove Sanitation, Inc., and its president and owner, John Lawson, were found to have discharged pollutants from a sewage treatment plant into the navigable waters of the United States in violation of 33 U.S.C §§1311(a) and 1319(c)(1)(A). On appeal, both defendants argue (1) that they were impermissibly singled out for prosecution; (2) that the trial court erred by not allowing the introduction of evidence concerning

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[1]The Honorable Horace W. Gilmore, United States District Judge for the Eastern District of Michigan, sitting by designation.

violations by other sewage treatment plants; (3) that the federal government lacked authority to prosecute the defendants criminally for violations of the Clean Water Act; (4) that the trial court should have granted a mistrial because of prejudicial statements made by a prosecution witness; (5) that the government failed to prove that the stream into which the pollutants were discharged constituted "navigable waters;" and (6) that the trial court improperly found that the defendants' motion for a new trial was not timely filed. Spanish Cove also argues that the trial court erred by imposing a fine which the company cannot pay, while Mr. Lawson contends that the trial court erred in its application of the sentencing guidelines.

We shall affirm both the conviction and the sentence of Mr. Lawson and the conviction of Spanish Cove. In light of the financial data contained in the record that we recently received from the district court, however, we are of the opinion that the fine imposed on Spanish Cove was excessive. We shall therefore remand the company's case to the district court for redetermination of the fine.

I

Spanish Cove owns and operates a small sewage treatment plant in Jefferson County, Kentucky. Mr. Lawson built the plant in the 1970s to serve a subdivision he had developed. The plant treats wastewater -- through aeration and chlorination, primarily -- and then discharges the effluent into a watercourse known as Fern Creek.

The defendants were charged with twelve misdemeanor and five felony violations of the Clean Water Act. The misdemeanor counts alleged that the defendants negligently discharged pollutants into Fern Creek. These charges were based upon "discharge

monitoring reports" that Spanish Cove was required to prepare under the Act. An independent laboratory -- functioning under contract with Spanish Cove -- collected samples of effluent discharged from the plant, tested the effluent, completed the reports, and returned the reports to Spanish Cove for signature and forwarding to the Kentucky Department of Water. The reports showed that on the dates named in the indictment Spanish Cove exceeded permissible levels for certain pollutants.

The felony counts of the indictment charged the defendants with knowing discharge of pollutants. Three of the felony counts involved an incident in which Mr. Lawson pumped water from a lagoon on the facility into the creek despite written instructions from the county health department not to do so. The water that was discharged contained fecal coliform bacteria in excess of the legal limits. The other two felony counts involved subsequent inspections in which the defendants were also found to have been discharging effluent containing excessive amounts of fecal coliform bacteria. On one of these occasions no chlorine tablets -- tablets that are necessary to treat the wastewater -- could be found at the plant.

A jury found the defendants guilty on all five of the felony counts and nine of the twelve misdemeanor counts. The verdicts were returned and filed on April 13, 1994, and were entered on the district court's docket the following day. A motion for a new trial was denied as untimely. Spanish Cove was sentenced to pay a fine of $35,000 and was ordered to pay a special assessment of $2,125. Mr. Lawson was ordered to pay a special assessment of $475 and was sentenced to imprisonment for a term of six months. Both defendants perfected timely appeals. Because of the pendency of certain post-trial

motions in the district court, however, the record was not transmitted to our court until March 27, 1996.

II

The defendants first argue that the district court should have dismissed the case on selective prosecution grounds. A *prima facie* case of selective prosecution requires a showing that (1) others who engaged in the same conduct were not prosecuted, and (2) the government singled out the defendant for prosecution based upon "such impermissible considerations as race, religion, or the desire to prevent the exercise of his constitutional rights." *United States v. Bustamante*, 805 F.2d 201, 202 (6th Cir. 1986), quoting (with minor changes) *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974). We must take special care in assessing a claim of selective prosecution because such a claim "asks a court to exercise judicial power over a 'special province' of the Executive." *United States v. Armstrong*, 116 S. Ct. 1480, 1486 (1996), quoting *Heckler v. Chaney*, 470 U.S. 821 (1985). We review for "clear error," *United States v. Sammons*, 918 F.2d 592, 600 (6th Cir. 1990), bearing in mind the Supreme Court's admonition that "'[t]he presumption of regularity supports' [] prosecutorial decisions and 'in the absence of clear evidence to the contrary, courts presume [prosecutors] have properly discharged their official duties.'" *Armstrong*, 116 S. Ct. at 1486, quoting *United States v. Chemical Found., Inc.*, 272 U.S. 1, 14-15 (1926).

To support their claim of selective prosecution, the defendants rely primarily upon reports of a large number of violations by the government-operated Louisville Metropolitan Sewer District (MSD). The defendants point out that MSD had 829 discharge monitoring report

violations between January 1989 and January 1993, but was subjected only to civil, not criminal, enforcement actions.

Although MSD did report numerous discharge monitoring report violations at its 71 plants, there is nothing to indicate that MSD engaged in the type of willful violations upon which the felony charges against Spanish Cove were predicated. Even if we were to assume that the defendants were prosecuted for violations of a type for which similar wrongdoers were not prosecuted, moreover, there is absolutely no evidence that the defendants were singled out based upon impermissible motives.

The defendants also contend that the prosecution was vindictive. They were prosecuted, the defendants argue, because they refused to accept a government offer allowing them to plead guilty to a single misdemeanor charge. In "the 'give and take' of plea bargaining," however, there is no violation of the Due Process Clause "so long as the accused is free to accept or reject the prosecution's offer." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). Here there is nothing to indicate that the defendants were not completely free to accept the government's offer. The claim of vindictive prosecution must therefore fail as well.

III

At trial the defendants attempted to introduce evidence of violations by other operators. The district court refused to allow this evidence, believing it irrelevant to the charges against the defendants. The defendants argue on appeal that the evidence should have been admitted as relevant to the standard of care. The defendants did not make this argument below, however,

and they may not do so for the first time in this court.

IV

The defendants also argue that the State of Kentucky has "primacy" to enforce the Clean Water Act, and that federal prosecution violates both the Due Process Clause and the intent of the Clean Water Act. The defendants have cited no authority to support their contention that the federal government is somehow precluded from enforcing this federal statute, and we are aware of no such authority.

V

At trial an inspector from the Jefferson County Health Department, Michael Baugh, testified that he had discovered unauthorized plastic pipes discharging waste materials at the site. Mr. Baugh recounted that after taking samples from the pipes, he had hurried to get away:

> "I felt like I was, like here I was, I had stepped into something that I knew obviously shouldn't have been happening and I was in the middle of a forested area and I could just picture little, you know, sounds going off and me being found in an aeration tank."

The court immediately instructed the jury to disregard Mr. Baugh's comments. After Mr. Baugh completed his testimony, the defense moved for a mistrial based upon the alleged prejudicial effect of the statements. The court denied the motion, noting that after the statement was made "everybody was chuckling a little bit, and it was right after he said something about [how he] thought your client

was a nice guy and so forth." In light of the trial judge's opportunity to judge the manner in which the comments were made and their effect on the jury, and given the prompt curative instruction, we cannot say that the trial court erred in not granting a mistrial.

VI

The defense also argues that the district court should have dismissed the charges under Rule 29, Fed. R. Crim. P., based upon insufficiency of the evidence. Most significantly, in this regard, the defense argues that the prosecution failed to demonstrate that Fern Creek qualifies as "navigable waters."

The Clean Water Act defines navigable waters as "the waters of the United States, including the territorial seas." 33 U.S.C. §1362(7). Regulations codified in the Code of Federal Regulations and applied by the court in *United States v. Larkins*, 852 F.2d 189, 190 n.1, n.3 (6th Cir. 1988), *cert. denied*, 489 U.S. 1016 (1989), say that "the waters of the United States" include:

> "(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> ...
>
> (c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, and sandflats, 'wetlands,' sloughs, prairie potholes, wet meadows, play

lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters;

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

...." 40 C.F.R. §122.2.

In *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317 (6th Cir. 1974), this court surveyed the legislative history of the Clean Water Act and concluded that the term "navigable waters" should be given an extremely broad construction. Congress, the court explained, intended that the Act apply "to all water bodies, including main streams and their tributaries." *Id.* at 1325, quoting comments of Congressman Dingell, relying upon this broad definition, this court found that the Clean

Water Act applied where a pollutant had been discharged into a non-navigable tributary of a non-navigable tributary of a non-navigable tributary of a small navigable river. *Id.* at 1320. See also *International Paper Co. v. Ouellette*, 479 U.S. 481, 486 n.6 (1987) (noting that the term "has been construed expansively to cover waters that are not navigable in the traditional sense"); *National Wildlife Fed. v. Consumers Power Co.*, 862 F.2d 580, 589 (6th Cir. 1988) (recognizing that it was "Congress's intent...that the term 'navigable waters' be given the broadest possible constitutional interpretation").

In the case at bar the prosecution presented evidence that Fern Creek waters "would migrate to the Ohio River." There is no dispute that the Ohio River is used in an interstate commerce. Accordingly, we believe there was sufficient evidence from which a reasonable jury could have found that the defendants discharged pollutants into "navigable waters."

VII

The district court denied the defendants' motion for a new trial as not having been filed within the time prescribed by Rule 33, Fed. R. Crim. P. The rule provides that such a motion, where not based on newly discovered evidence, "shall be made within 7 days after verdict..." The defendants argue that the district court erred by counting the time from the date on which the jury returned its verdict, rather than the date on which the verdict was entered in the docket. But the date of entry is not the date of the verdict. The time runs from the date on which the jury returns its verdict, not the date on which the clerk enters the verdict in the docket. See *United States v. DeRocco*, 320 F. 2d 58, 59 (6th Cir. 1963).

VIII

Mr. Lawson argues that his sentencing guidelines offense level should have been reduced for acceptance of responsibility pursuant to U.S.S.G. §3E1.1. At trial, however, Mr. Lawson denied the factual elements of guilt. He contended, for example, that the samples upon which the misdemeanor counts were predicated had not been taken from the proper location and had not been properly tested. At no point in the proceedings did he admit that he had engaged in the conduct with which he was charged. The district court was therefore within its discretion in not adjusting the offense level downward for acceptance of responsibility.

IX

Nor do we find error in the district court's decision to adjust Mr. Lawson's offense level upward on the ground that the violation "involved a discharge without a permit or in violation of a permit." Mr. Lawson argues that even though the discharges exceeded permissible levels, they were not in violation of the permit because the permit merely required that he keep records and monitor pollutant levels in the effluent. Be that as it may, Mr. Lawson admitted on the stand that he had discharged pollutants from four points of discharge when he only had a permit for one. This certainly constitutes a discharge without a permit.

X

Spanish Cove argues that the district court erred in imposing a fine which the company does not have the ability to pay. U.S.S.G. §8C3.3(b) allows a court to impose a fine in an amount less than otherwise would be required where "the court finds that the organization is not

able, and even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum fine." For the purposes of the guidelines, an organization is not able to pay the minimum fine, where, even with an installment schedule, "the payment of that fine would substantially jeopardize the continued existence of the organization." U.S.S.G. §8C3.3, Application Note 1.

In this case the court imposed a fine of $35,000 on Spanish Cove after making a specific finding that the company had the ability to pay a fine in that amount. Spanish Cove filed a motion for reconsideration, and the district court stayed payment of the fine pending appeal.

There is persuasive evidence that Spanish Cove cannot pay a $35,000 fine -- at least not in one installment. The company's latest balance sheet reflects virtually no liquid assets, and the record indicates that virtually all corporate income (roughly $2,050 per month) is used to cover expenses. The company's federal tax returns indicate that prior to utilizing a net operating loss deduction Spanish Cove had net income of only $2,243.53 in 1993, $23,988 in 1992[2], a loss of $12,496 in 1991, a loss of $8,122 in 1990, and a loss of $7,207 in 1989. The company's financial situation looks a little better when we consider that a portion of its deductions from income -- $6,635 in 1993, $6,197 in 1992, $8,552 in 1991, $8,552 in 1990, and $8,552 in 1989 -- constituted depreciation for plant and plant equipment. Presumably the capital investments in question were made in prior years, and thus Spanish Cove's taxable income is not entirely indicative of

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[2]This was largely due to income realized from forgiveness of a $20,840 debt.

its ability to pay. Even if these sums were treated as part of Spanish Cove's annual income, however, it would not appear that the corporation could manage a single $35,000 payment.

A review of the company's balance sheets supports this conclusion. The most recent balance sheet (1994) shows assets of $60,844 and labilities of $177,853. (Of the liabilities, $147,353 represents loans from "John Lawson Realty Co., Inc.") The assets consist almost entirely of the sewer plant, the equipment necessary to run the plant, and the land on which the plant sits.

The financial records thus demonstrate that the corporation barely receives enough funds each year to keep the sewer plant in operation, and that the corporation has no assets other than those necessary to operate the facility. This assessment of the financial health of Spanish Cove is supported by a determination of the United States trustee in Mr. Lawson's personal bankruptcy proceeding. The trustee formally abandoned "[a]ny interest the estate may have in Spanish Cove Sanitation, Inc....because it appears...that Spanish Cove [] is insolvent and of no value to the estate." The abandonment was approved by the bankruptcy judge.

The district court's determination that Spanish Cove is able to pay a $35,000 fine in a single payment was clearly erroneous, in our view. The fine against Spanish Cove is therefore **VACATED**, the Spanish Cove judgment is **AFFIRMED** in all other respects, and the case appealed to us as No. 94-6508 is **REMANDED** for redetermination of the fine. The judgment entered against Mr. Lawson in the case appealed to us as No. 94-6509 is **AFFIRMED**.

Case Nos.: 94-6508 & 94-6509

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ORDER

FILED
AUG 20 1996
LEONARD GREEN, Clerk

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

SPANISH COVE SANITATION, INC.;
JOHN LAWSON

Defendants - Appellants

BEFORE: NELSON and BOGGS, Circuit Judges, and GILMORE, District Judge.*

Upon consideration of the petition for rehearing filed by the appellants,

It is **ORDERED** that the petition for rehearing be, and it hereby is, **DENIED**.

ENTERED BY ORDER OF THE COURT

[Signed by Leonard Green]
Leonard Green, Clerk

*The Honorable Horace W. Gilmore, United States District Judge for the Eastern District of Michigan, sitting by designation.

33 U.S.C. § 1319(c)(1)(A)
33 U.S.C. § 1319(c)(2)(A)

§ 1319. Enforcement

(c) Criminal Penalties

(1) Negligent violations

Any person who -

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

shall be punished by a fine of not less that $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than 2 years, or by both.

(2) Knowing violations

Any person who -

(A) knowing violates section 1311, 1312, 1316,

1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

shall be punished by a fine of not less than $5,000 nor more than $50,000 per day of violation, or by imprisonment for not more than 3 years, or by both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $100,000 per day of violation, or by imprisonment of not more than 6 years, or by both.

(B) Any person who knowingly makes any false statement, representation or certification in any application, record, report, plan, or other document filed or required to be maintained under this chapter or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this chapter, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(C) For the purposes of this subsection, the term "person" shall mean, in addition to the definition contained in section 1362(5) of this title, any responsible corporate officer.

[FRL-5184-4]

Voluntary Environmental Self-Policing and Self-Disclosure Interim Policy Statement

AGENCY: Environmental Protection Agency (EPA).
ACTION: Interim policy statement and request for comment.

SUMMARY: The Environmental Protection Agency (EPA) announces and requests comment on an interim policy to provide incentives for regulated entities that conduct voluntary compliance evaluations and also disclose and correct violations. These incentives include eliminating or substantially reducing the gravity component of civil penalties and not referring cases for criminal prosecution where specified conditions are met. The policy also states that EPA will not request voluntary audit reports to trigger enforcement investigations. This interim policy was developed in close consultation with EPA's regional offices and the Department of Justice, and will be applied uniformly by the Agency's enforcement programs.

DATES: This interim policy statement is effective as interim guidance 15 days after publication, in order to give the Agency time to coordinate implementation of the policy throughout EPA Headquarters and the Regions. EPA urges interested parties to comment on this interim policy in writing. Comments must be received by EPA at the address below by June 2, 1995.

ADDRESSES: Submit three copies of comments to the U.S. EPA Air Docket, Mail Code 6102, 401 M. Street, SW, Washington, DC 20460, attention: Docket #C-94-01

FOR FURTHER INFORMATION CONTACT: Additional documentation relating to the development of this interim policy is contained in the environmental auditing public docket. Documents from the docket may be requested by calling (202) 260-7548, requesting an index to docket #C-94-01, and faxing document requests to (202) 260-4400. Hours of operation are 8 a.m. to 5:30 p.m., Monday through Friday, except legal holidays. Additional contacts are Geoff Garver or Brian Riedel, at (202) 564-4187.

SUPPLEMENTARY INFORMATION:

I. Background

A. Introduction

One of the Environmental Protection Agency's most important responsibilities is obtaining compliance with federal laws that protect public health and safeguard the environment. That goal can be achieved only with the voluntary cooperation of thousands of businesses and other regulated entities subject to these requirements. Today, EPA is announcing incentives for those who take responsibility for voluntarily evaluating, disclosing and correcting violations. These incentives, developed after nine months of public meetings and empirical analysis, are set forth in detail below and take effect in 15 days. At the same time, EPA expects to continue a dialogue with stakeholders and consider further refinements to this interim policy. The incentives that EPA is offering fall into three distinct categories.

First, the Agency will completely eliminate gravity-based (or "punitive") penalties for companies or public agencies that voluntarily identify, disclose and correct

violations according to the conditions outlined in this policy. EPA will also reduce punitive penalties by up to 75% for companies that meet most, but not all, of these conditions. Second, EPA will not recommend to the Department of Justice that criminal charges be brought against a company acting in good faith to identify, disclose, and correct violations, so long as no serious actual harm has occurred. Finally, the Agency will not request voluntary environmental audits to trigger enforcement investigations.

The incentives offered in this policy have been structured above all to protect human health and the environment. For example, even where the conditions for mitigated enforcement were met, EPA will reserve the right to collect full civil penalties for criminal conduct, violations that present an imminent and substantial endangerment or result in serious actual harm, or repeat violations. Sources will not be allowed to gain an economic advantage over their competitors by delaying their investment in compliance. Nor will EPA hesitate to bring a criminal action against individuals responsible for criminal conduct.

EPA is considering additional incentives for voluntary compliance beyond the benefits offered in the policy today. On April 7, 1995, the Agency will announce 12 Environmental Leadership Program (ELP) pilot projects with companies and public agencies to test criteria for auditing and certification of voluntary compliance programs. If successful, standards developed through Environmental Leadership could lead to reduced inspections and public recognition for companies or agencies with state-of-the-art compliance programs. In keeping with the President's announcement on March 16, 1995, EPA also will shortly be announcing additional

compliance incentives for small businesses.

The Agency is especially interested in comments relating to whether this interim policy appropriately defines the criteria for determining whether a self-audit, self-evaluation or disclosure is voluntary; whether the interim policy adequately preserves the Agency's authority to assess a gravity penalty component in appropriate cases; and whether, and according to what criteria, the Agency should consider giving credit against the economic benefit component of a penalty for state-of-the-art environmental management systems.

B. Public Process

In May 1994, the Administrator asked the Office of Enforcement and Compliance Assurance to determine whether additional incentives are needed to encourage voluntary disclosure and correction of violations uncovered during environmental audits and self-evaluations.

In developing this interim policy, the Agency held a major two-day public meeting in July 1994 announced in the **Federal Register** on June 20, 1994 (59 FR 31914); published a Restatement of Policies Related to Environmental Auditing in the **Federal Register** on July 28, 1994 (59 FR 38455); considered over 80 written comments submitted to the environmental auditing policy docket; held a focus group meeting in San Francisco on January 19, 1995 with key stakeholders from industry, trade groups, State environmental commissions, State attorneys general offices, district attorneys' offices, environmental and public interest groups, and professional environmental auditing groups; and held a public comment session in San Francisco on January 20, 1995.

In addition to considering opinion from stakeholders, EPA conducted its own analysis of relevant facts. For example, the Agency considered EPA and other Federal policies relating to environmental auditing, self-disclosure, and correction, as well as incentives suggested by State and local policies and legislation, and by applications submitted for the ELP pilot program. The Agency also considered relevant surveys on auditing practices and incentives.

C. Purpose

This interim policy is intended to promote environmental compliance by providing greater certainty as to EPA's enforcement response to voluntary self-evaluations, and voluntary disclosure and prompt correction of violations. The policy further provides guidance for States and local authorities in encouraging this behavior among regulated entities.

Federal laws and regulations set minimum standards for protecting human health and achieving environmental protection goals such as clean air and clean water. EPA will continue to uphold these laws through vigorous enforcement actions that appropriately penalize violators. Penalties help ensure a level playing field by ensuring that violators do not obtain an unfair economic advantage over their competitors who made the necessary investment in compliance. Penalties also promote protection of the environment and public health by encouraging adoption of pollution prevention and recycling practices that limit exposure to liability for pollutant discharges and deterring future violations by the violator and others.

At the same time, the Agency recognizes that we cannot achieve maximum compliance without the cooperation of a regulated community willing to act responsibly by detecting, disclosing, and correcting violations. Already, regulated entities have many compelling incentives to implement environmental management/auditing systems, as noted in EPA's 1986 auditing policy. Indeed, recent surveys show that the vast majority of large companies engage in environmental auditing and/or have environmental management systems in place. Nonetheless, EPA has concluded that the additional incentives in this interim policy will further promote the regulated community's commitment to adopting systems for maximizing compliance.

D. Principles for Voluntary Compliance

The interim policy that EPA is announcing today is based on seven principles:

1. Self-policing by regulated entities can play a crucial role in finding, fixing and preventing violations.

2. Violations discovered through self-policing should be disclosed and promptly corrected.

3. Regulated entities that self-police and that voluntarily disclose and self-correct violations in accordance with this policy should be assessed penalties that are consistently and predictably lower than penalties for those who do not.

4. Regulated entities that self-police and voluntarily disclose and self-correct violations in accordance with this policy should also not be recommended for criminal prosecution.

5. Providing predictable incentives for voluntary disclosure and correction of violations identified

through self-policing offers a positive alternative to across-the-board privileges and immunities that could be used to shield criminal misconduct, drive up litigation costs and create an atmosphere of distrust between regulators, industry and local communities.

6. EPA should not seek voluntary environmental audit information to trigger an investigation of a civil or criminal violation of environmental laws.

7. To preserve a level playing field, EPA should recover any economic benefit realized from violations of environmental law.

E. Relationship to Emerging Standards

EPA also recognizes the development of and growing reliance on international voluntary environmental management standards in the U.S. and other countries. These standards, if properly crafted and implemented, can provide a powerful tool for organizations to improve their overall compliance with environmental requirements and move beyond compliance through innovative approaches to pollution prevention. In addition to issuing this interim policy, EPA will continue to pursue a dialogue with interested parties and to pilot policy approaches through programs such as the ELP to determine how EPA can make use of and encourage these standards.

II. Interim Policy

A. Definitions

For purposes of this interim policy, the following definitions apply:

"Environmental auditing" has the definition given to it in EPA's 1986 policy on environmental auditing, i.e. "a systematic, documented, periodic and objective review by regulated entities of facility operations and practices related to meeting environmental requirements."

"Environmental audit report" means all documentation of information relating to an environmental audit, but not including the factual information underlying or testimonial evidence relating to such information.

"Regulated entity" means any entity, including a federal, state, and municipal facility, regulated under the federal environmental laws that EPA administers.

"Self-evaluation" means an assessment, not necessarily meeting all the criteria of a full environmental audit, by a regulated entity of its compliance with one or more environmental requirements.

"Voluntary" means not required by statute, regulation, permit, order or agreement.

B. Conditions

The conditions for reducing civil penalties and not making criminal referrals in accordance with Sections II.C. and II.D. of this interim policy are as follows:

1. *Voluntary self-policing.* The regulated entity discovers a violation through a voluntary environmental audit or voluntary self-evaluation appropriate to the size and nature of the regulated entity; and

2. *Voluntary disclosure.* The regulated entity fully and voluntarily discloses the violation in writing to all appropriate federal, state and local agencies as soon as it is discovered (including a reasonable time to determine that a violation exists), and prior to (1) the

commencement of a federal, state or local agency inspection, investigation or information request; (2) notice of a citizen suit; (3) legal complaint by a third party; or (4) the regulated entity's knowledge that the discovery of the violation by a regulatory agency or third party was imminent; and

3. *Prompt correction.* The regulated entity corrects the violation either within 60 days of discovering the violation or, if more time is needed, as expeditiously as practicable; and

4. *Remediation of imminent and substantial endangerment.* The regulated entity expeditiously remedies any condition that has created or may create an imminent and substantial endangerment to human health or the environment; and

5. *Remediation of harm and prevention of repeat violations.* The regulated entity implements appropriate measures to remedy any environmental harm due to the violation and to prevent a recurrence of the violation; and

6. *No lack of appropriate preventive measures.* The violation does not indicate that the regulated entity has failed to take appropriate steps to avoid repeat or recurring violations; and

7. *Cooperation.* The regulated entity cooperates as required by EPA and provides such information as is reasonably necessary and required by EPA to determine applicability of this policy. Cooperation may include providing all requested documents and access to employees and assistance in any further investigations into the violation.

Where appropriate, EPA may require that to satisfy any of these conditions, a regulated entity must enter into a written agreement, administrative consent order or judicial consent decree, particularly where compliance or

remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required.

C. Reduce Civil Penalties for Voluntarily Disclosed and Promptly Corrected Violations

1. Incentive

Regulated entities will be eligible for the following reductions in civil penalties:

a. EPA will eliminate all of the gravity component of the penalty for violations by regulated entities that meet conditions 1 through 7 outlined in Section II.B., except for violations involving (i) criminal conduct by the regulated entity or any of its employees, or (ii) an imminent and substantial endangerment, or serious actual harm, to human health or the environment.

b. EPA may mitigate up to 75% of the unadjusted gravity component of the penalty, taking into account any of the conditions 1-7 in Section II.B. that are met, in the following cases:

(i) cases in which most but not all of the conditions in Section II.B. are met; or

(ii) cases involving an imminent and substantial endangerment, but not serious actual harm, in which all the conditions in Section II.B. are met; or

(iii) cases involving the disclosure of criminal conduct in which all the conditions in Section II.B. are met.

c. EPA will retain its full discretion to recover any economic benefit gained as a result of noncompliance to preserve a "level playing field" in which violators do not gain a competitive advantage through noncompliance.

However, EPA may forgive the entire penalty for violations which meet conditions 1 through 7 outlined in Section II.B. and, in EPA's discretion, do not merit any penalty due to the insignificant amount of any economic benefit.

2. Discussion

a. Providing a clear and significant reduction in civil penalties for companies that assume responsibility for finding, disclosing and correcting violations will create a strong incentive for regulated entities to prevent or fix violations before EPA expends enforcement resources. The policy states clearly the conditions under which EPA will forgive all or part of the gravity component of a penalty for voluntary disclosure and correction;

b. The policy appropriately preserves the concept of recovering economic benefit, except where it is insignificant, as recommended by a broad spectrum of commenters, including industry commenters;

c. Retaining EPA's discretion to collect the gravity component of the penalty in appropriate cases, such as where a violation involves criminal conduct, or imminent and substantial endangerment, will help to deter the most egregious environmental violations. At the same time, by preserving flexibility to reduce the gravity element by up to 75% for good faith efforts to disclose and promptly comply even in those cases, the policy will retain an appropriate compliance incentive.

D. Limit Criminal Referrals for Voluntary Disclosure and Correction of Violations

1. Incentive

EPA will not recommend to the Department of Justice that criminal charges be brought against a regulated entity where EPA determines that conditions 1-7 in Section II.B. above for reduction of civil penalties are met, and the violation does not demonstrate or involve (1) a prevalent corporate management philosophy or practice that concealed or condoned environmental violations; (2) high-level corporate officials' or managers' conscious involvement in or willful blindness to the violation; or (3) serious actual harm to human health or the environment. This policy does not apply to criminal acts of individual managers or employees. Where EPA determines pursuant to this Section that a criminal referral to the Department of Justice is unwarranted, EPA may nonetheless proceed with civil enforcement in accordance with Section II.C. of this policy or other applicable enforcement response and penalty policies.

2. Discussion

The policy will promote candid and thorough self-policing by providing greater certainty as to how EPA will exercise its criminal investigative discretion to encourage voluntary disclosure and prompt correction by regulated entities.

E. Eliminate Route Requests for Audit Reports in Pre-Enforcement Proceedings

1. Incentive

EPA will not request a voluntary environmental audit report to trigger a civil or criminal investigation. For example, EPA will not request an audit in routine inspections. Once the Agency has reason to believe a violation has been committed, EPA may seek through an investigation or enforcement action any information relevant to identifying violations or determining liability or extent of harm.

2. Discussion

a. This policy makes clear that EPA will not routinely request audit reports. At the same time, the policy in no way limits the right of regulated entities to claim common law privileges (e.g., attorney-client and work product) as appropriate. EPA believes that this clarification, along with the other incentives in this interim policy, should greatly reduce any perception that environmental audits may be used unfairly in environmental enforcement.

b. With respect to federal facilities, although federal facility environmental audit reports may be accessible to the public under the Freedom of Information Act (FOIA) in certain circumstances, EPA cannot utilize FOIA to request information from other federal agencies. Thus, EPA will apply this policy on requests for audit reports to federal (and state and municipal) facilities the same as it does for other regulated entities.

F. Applicability

This interim policy applies to violations under all of the federal environmental statutes that EPA administers and supersedes (unless otherwise noted) any conflicting or inconsistent provisions in the media specific penalty or enforcement response policies and EPA's 1986 Environmental Auditing Policy Statement. Existing enforcement policies will continue to apply in conjunction with this interim policy, except where inconsistent with this policy. In addition, where appropriate, EPA's Supplemental Environmental Project Policy may at EPA's discretion be applied in conjunction with this policy.

III. Favor These Incentives Over Broad Privileges and Immunities

This interim policy offers a positive alternative to across-the-board privileges and immunities that could be used to shield criminal misconduct, drive up litigation costs and create an atmosphere of distrust between regulators, industry and local communities.

A. Discussion

1. Penalty immunity provisions for voluntary disclosures of violations can give lawbreakers an economic advantage over their law-abiding competitors. It makes sense to give substantial penalty reductions for those who come forward with their violations and promptly correct them, but to maintain a level playing field, the federal and state governments must be able to recoup the economic benefit of violations.

2. A principal rationale for environmental audit privileges and penalty immunities for voluntary disclosures is to reduce the exposure of regulated entities and conduct self-evaluations *and act on the findings by immediately correcting violations.* EPA has addressed this concern with the incentives for disclosure and correction outlined above.

3. Privilege runs counter to efforts to open up environmental decision making and encourage public participation in matters that affect people's homes, work places and communities.

4. An environmental audit privilege could be misused to shield bad actors or to frustrate access to crucial factual information.

5. Environmental audit privileges and penalty immunities could encourage increased litigation as opposing lawyers battle over what is privileged or immune from penalties and what is not. Litigation over the scope of the privileges and immunities could burden our already taxed judicial system, drain government and private resources, and in some cases prevent quick action to address environmental emergencies.

6. The Supreme Court has noted, "privileges are not lightly created nor expansively construed for they are in derogation of the search for the truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974). Moreover, the self-evaluation privilege has regularly and uniformly been rejected by the courts in cases where documents were sought by a governmental agency.

IV. Consequences for States

EPA recognizes that states are important partners in federal enforcement, and that it is desirable to create a climate in which states can be innovative. At the same

time, EPA is required to establish a certain minimum consistency in federal enforcement, so that the sanctions a business faces for violating federal law do not depend on where the business is located.

Accordingly, to maintain national consistency:

A. EPA will scrutinize enforcement more closely in states with audit privilege and/or penalty immunity laws and may find it necessary to increase federal enforcement where environmental self-evaluation privileges or penalty immunities prevent a state from obtaining:

1. information needed to establish criminal liability;

2. facts needed to establish the nature and extent of a violation;

3. appropriate penalties for imminent and substantial endangerment or serious harm to human health or the environment, or from recovering economic benefit;

4. appropriate sanctions or penalties for criminal conduct and repeat violations; or

5. prompt correction of violations, and expeditious remediation of those that involve imminent and substantial endangerment to human health or the environment.

B. EPA will bring to the state's attention any provisions of state audit privilege and/or penalty immunity statutes that raise any of the concerns outlined above, and will work with the state to address those concerns and ensure that federal requirements are satisfied.

V. Limitations on Applicability of This Policy

This interim policy sets forth internal guidelines which amend EPA's penalty polices in situations involving

voluntary self-policing, disclosure and correction. In conjunction with the applicable penalty policy, these guidelines will aid EPA personnel in proposing appropriate penalties or negotiating settlements in administrative and judicial enforcement actions. The interim policy also serves to structure the Agency's enforcement authority and states the Agency's view as to the proper allocation of its enforcement resources. Deviations from these guidelines, where merited, are authorized so long as the reasons for the deviations are documented.

This interim policy is not final agency action, but is intended solely as guidance. It is not intended, nor can it be relied upon, to create any rights enforceable by any party in litigation with the United States. EPA officials may decide to follow the guidance provided in this interim policy or to act at various with the guidance based on analysis of case-specific facts and circumstances. Application of this policy to the facts of any individual case is at the sole discretion of EPA and is not subject to review by any court. In addition, the policy has no effect on the calculation of any cleanup costs, remedial costs, nature resources damages or emergency response costs associated with a violation. EPA reserves the right to change this interim policy at any time without public notice.

Dated: March 30, 1995.

Steven A. Herman,

Assistant Administrator for Enforcement and Compliance Assurance.

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U.S. Department of Justice

United States Attorney

Western District of Kentucky

502/582-5911
FTS/352-5911

Bank of Louisville Building
510 West Broadway
Louisville, Kentucky 40202

August 25, 1992

Hon. Michael R. Gosnell
Attorney at Law
Suite 160
Legal Arts Building
200 South Seventh Street
Louisville, Kentucky 40202

Re: John Lawson, Spanish Cove Waste Water Treatment Plant

Dear Mr. Gosnell:

This letter is to confirm our conversation of today's date and a meeting held in my office at which yourself, F.B.I. Agent Wayne McAllister and I were present. Discussed was a possible plea of guilty by Mr. Lawson to a misdemeanor charge involving three unpermitted discharges at the Spanish Cove Waste Water Treatment

Plant which occurred on December 30, 1991. The charges would constitute violations of the Clean Water Act, 33 U.S.C. §1319.

In return for a plea to a single misdemeanor charge, the recommendation of the United States would be a sentence at the lowest end of the applicable sentencing guideline range and a two-level reduction for acceptance of responsibility, should that be appropriate. A fine would also be a part of our recommendation; however, we have agreed to allow the amount of the fine to be undetermined at the present time. To accomplish the goal of setting an appropriate fine level, I am enclosing a copy of a United States Department of Justice Financial Statement Form. I request that if this matter is to be resolved by plea that the form be filled out and returned to me.

In addition to the above conditions of a possible plea agreement, we will request the following:

1. Clean up of the lagoon at Spanish Cove within sixty days of entry of a plea;

2. A redesign of the treatment plant with approval by the Kentucky Division of Water;

3. Establishment of a flow meter on the plant; and

4. Requirement that a licensed operator be responsible for the plant.

The above would be conditions of any probation or supervised release imposed by the Court in the case.

Per your request, I will await a decision by Mr. Lawson on the proposed agreement until close of business, Monday, September 21, 1992. Unless the above is agreeable with Mr. Lawson, this investigation will proceed subsequent to that date with the possible presenting of felony charges to the federal grand jury.

If I can be of further assistance, please do not hesitate to contact me.

Sincerely,

JOSEPH M. WHITTLE
United States Attorney

/S/
Randy Ream
Assistant U.S. Attorney

Enclosures

cc: S/A McAllister